Fiduciary Breach: Avoidance and Mitigation

Workshop 21
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10:15-11:30 am
presented by

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Agenda

- Who’s a fiduciary?
- What are the duties?
- What can a fiduciary be held liable for?
- What’s all this about a new reg?
- Case studies

Who’s a Fiduciary?

- Persons named in the plan
  - Plan Administrator
  - Trustees
- Persons who:
  - Exercise discretionary authority or control respecting the management of the plan or exercise any authority or control concerning the management or disposition of assets. ERISA §3(21)(A)(i)
Who’s a Fiduciary?

- Provide investment advice for a fee. ERISA §3(21)(A)(ii)
- Have discretionary authority or responsibility in the administration of the plan. ERISA §3(21)(A)(iii)

What are the Duties?

- Exclusive Purpose Rule (ERISA §404(a)(1)(A))
  - Fiduciary must discharge their duties with the exclusive purpose of providing benefits to participants and beneficiaries
  - Exception for the use of plan assets to pay reasonable expenses relating to the plan's operation and administration
What are the Duties?

- Prudent Man Rule (ERISA §404(a)(1)(B))
  - Must act with the care, skill, prudence and diligence under the circumstance that a prudent man acting in a like capacity would act.
  - Based upon how a person with experience and knowledge would act.
  - If lacking the expertise, expert help must be obtained.

- Diversification (ERISA §404(a)(1)(C))
  - Must diversify investments to minimize the risk of loss.
  - Exception for the situation where it would be prudent not to diversify.
  - Exception for eligible individual account plans holding employer securities (ESOPs and other plans holding qualified employer securities).
What are the Duties?

- Plan Document Rule (ERISA §404(a)(1)(D))
  - Must act in accordance with the plan's governance document (i.e. plan document, trust, investment policy statement, etc.)
  - Exception where plan is inconsistent with ERISA generally.

What are the Duties?

- Not to Engage in Prohibited Transactions (ERISA §406)
  - Transactions with participants
  - Transactions with fiduciaries
  - Transactions with other related parties (parties in interest)
What Can a Fiduciary Be Held Liable For?

- Fiduciary is personally liable for their breaches (ERISA §409)
  - The fiduciary must make the plan whole for losses.
  - Restore to the plan any profits they made through the use of plan assets.

What Can a Fiduciary Be Held Liable For?

- Fiduciary is also responsible for a breach by another fiduciary under certain circumstances (ERISA §405)
  - Knowingly participated or concealed breach. ERISA §405(a)(1)
  - Enabling the breach to occur. ERISA §405(a)(2)
  - No reasonable steps taken to remedy the situation. ERISA §405(a)(3)
What New Reg?

- A fiduciary includes anyone who gives “investment advice” for compensation (ERISA §3(21)(A)(ii))
  - “investment advice” is not defined in ERISA, only a reg adopted in 1975 – 2510.3-21(c)
- DOL proposes to modify the definition
  - Lots of opposition and comments
  - Will be adopted – probably 1st quarter 2016
  - “Applicability date” will be 8 months later…before the new administration takes over in January 2017

What New Reg?

- “investment advice” will include advice to a plan, plan fiduciary, participant, IRA or IRA owner that constitutes
  - A “recommendation” re: buying, selling or holding assets
  - A “recommendation” re: investment of assets to be rolled over or otherwise distributed from a plan or an IRA
  - Recommendation as to management of property to be rolled over or otherwise distribution from a plan or IRA
What New Reg?

- “Certain” appraisals
- Recommendation of a person who is going to receive a fee for providing any of these types of advice
  - So acting as a “solicitor” makes you a fiduciary
  - And recommending an investment manager does too

What New Reg?

- “Recommendation” is a defined term
  - Means a communication that would reasonably be viewed as a suggestion that the recipient engage in or refrain from taking a course of action
  - The communication must be specifically directed to a recipient for consideration in making an investment or management decision
- So you are giving fiduciary investment advice if you direct a suggestion to somebody for them to consider
What New Reg?

- Various “carve outs”
  - “seller”
  - Platform but only for participant-directed plans
  - Selecting and monitoring assistance to participant-directed plans
  - Education – but you can’t identify specific securities

- Exemptions
  - BICE
  - 84-24

What New Reg?

- Impact
  - Biggest on broker-dealers
  - Some on producing tpas
  - Not much on recordkeepers or RIAs
  - Rollovers
Case Study #1

- Who are the fiduciaries?
  - Walter
  - Harry
  - Mary
  - Green
  - Taylor
  - Black
  - Acme or Jordan
  - Nash
  - Justice

Case Study #1

- What fiduciary breaches may have occurred and who may be liable?
- Were there any prohibited transactions? By whom?
- What could have been done to protect the participants and non-breaching fiduciaries?
Case Study #2

- Who are the fiduciaries?
  - Smith, Jones, and Clark
  - Bock
  - Board of Directors
  - Harris
  - CPA White
  - Campbell

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